

**THE VALIDITY OF “FURTHER” CUSTOMARY MARRIAGES:  
A NEW LEGAL CONUNDRUM**

*MZG and BM case no 10/37362 (GSJ)*

## 1 Introduction

Polygyny is part of customary law and is not outlawed in terms of the Recognition of Customary Marriages Act 120 of 1998 (hereinafter the RCMA.)

Students of customary law take this for granted, although realising that during the subsistence of a customary marriage “further” customary marriages must be regulated by prior contract. In *MM v MN* 2010 4 SA 286 (GNP) Bertelsmann J carefully considered the question whether marriages entered into without such prior contracts are in fact valid. He found that they are *ab initio* void.

In a recent comparable case *MZG and BM case no 10/37362 (GSJ)*, Moshidi J came to a contrary conclusion. In this note we evaluate these two judgments. To do so we commence with a more elaborate outline of the legal framework.

Section 7(6) of the RCMA recognises and attempts to regulate the practice of polygyny by providing that a husband in a customary marriage “who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages”. The provision stipulates that, where the existing marriage is in community of property, “the court must terminate the matrimonial system which is applicable to the marriage and effect a division of the matrimonial property”. It must also ensure an equitable distribution of the property and “take into account all the relevant circumstances of the family groups which would be affected if the application is granted” (s 7(7)). The court has wide powers to alter the terms of the contract, to “grant the order subject to any condition it may deem just” or refuse the application if “the interests of any of the parties involved would not be sufficiently safeguarded” (s 7(7)(6)).

Although the legal framework attempts to regulate polygyny and protect the financial integrity of the first wife, the RCMA stops short of ensuring the first wife’s consent before allowing a man to take subsequent wives. Rather, the statute merely requires that the current wife or wives be joined in a property dissolution process if the marriage is in community of property (s 7(8)). Moreover, the statute provides no sanction or enforcement mechanism for a failure to seek this judicial process before a man enters into a subsequent marriage contract.

## 2 Bertelsmann case

The facts of the case were briefly as follows: The applicant married the late HM in accordance with customary law on 1 January 1984. Her husband passed away on 28 February 2009. The marriage was never registered. It was moreover not preceded by an application to a court of appropriate jurisdiction for an order approving the contract to regulate the future matrimonial systems of the two marriages, as required by section 7(6) of the RCMA. The court was called upon to decide whether the marriage was indeed valid.

### 2.1 *No express provisions about invalidity*

In this regard Bertelsmann states:

“The failure to comply with the mandatory provisions of this subsection cannot but lead to the invalidity of a subsequent customary marriage, even though the Act does not contain an express provision to that effect. Cronje and Heaton argue in *South African Family Law* 2 ed at 204, that the court’s intervention would be rendered superfluous – which the legislature could not have intended – if invalidity did not result from a failure to observe ss(6)” (para 24).

### 2.2 *Peremptory language*

In this regard Bertelsmann states (paras 25–26) that a further argument, that a failure to comply with the subsection leads to invalidity of the subsequent further marriage, arises from the peremptory language of the word “must”. In addition, he points out subsection (7)(b)(iii) empowers the court to refuse to register a proposed contract. This “indicates that the legislature intended non-compliance with the statute to lead to voidness of a marriage in conflict with the provisions”.

### 2.3 *Infringement of earlier spouses’ fundamental rights*

On account of the patrilineal nature of customary law, women have for many years been so-called perpetual minors. The RCMA has been hailed as a victory for women. If, now, they are in regard to ‘further’ customary marriages at the mercy of their husbands it will be a backward phase of insubordination. To emphasise this we quote in full what Bertelsmann said in this regard:

“The most persuasive consideration must however be the gross infringement of the first or earlier spouses’ fundamental rights: to respect of their dignity, physical and emotional integrity; their right to protection from abuse – in this instance both emotional and economic or material; their right to be treated on an equal footing with their husband, as decreed by the Act; their right to equal status as marriage partners, arising from the Act; their right to marital support from their husband; and their right to marital intimacy and trust, which rights flow naturally from those guaranteed by the Act and the Constitution. A gross infringement of these rights would be committed if the husband were to be allowed to enter into a further marriage without their knowledge and acquiescence . . . On the other hand the intending spouse in a further marriage is, by the same token, entitled to be fully informed prior to the conclusion of such marriage of her future husband’s existing marriages and the full financial and emotional consequence thereof” (paras 27–28).

### 2.4 *Rights of children*

Bertelsmann para 30 is also concerned about the fact that children born from an earlier marriage may be adversely affected. We may add that even existing children of the women in the “later” marriages will be brought to bear the unknown consequences of the new marriage. In this regard Bertelsmann refers to section 28(2) of the Constitution which provides that “a child’s best interests are of paramount importance in every matter concerning the child”. The mother of such children, and mature children themselves, have an obvious interest in the consequences of ‘further’ marriages.

## 3 **Moshidi case**

The facts of the case are as follows: The deceased was married by customary law to a woman, referred to as BM (the first respondent). He died on 1 February 2010. The marriage was duly registered. The applicant (referred to as MZG) contends that she married the deceased also by customary law, but that they had

failed to register the marriage. In view of the failure she was obliged to apply to court for registration in terms of section 4(7) of the RCMA.

### 3.1 *Validity of customary marriage*

The question whether there was a customary marriage was also an issue, as well as whether it was valid in view of section 7(6) of the Act, which provides that:

“A husband . . . who wishes to enter into a further customary marriage . . . must make an application to the court to approve a written contract which will regulate the future matrimonial property system of the marriages.”

In the Moshidi judgment a great deal revolved around the applicant’s contention that no customary marriage was concluded at all. Our concern is not whether the requirements have been met *but* we disagree that it was valid simply and only because “in terms of section 7(6) of the Act the husband failed to make an application to court to approve a written contract to regulate the future matrimonial property system of his marriages”.

Moshidi J from paragraph 19 onwards in our view does not add substantial legal grounds for holding that the marriage is nevertheless valid. He seems to be overly impressed that legal journals and publications are replete with uncertainty regarding the proper and future interpretation of the section (para 19). Calling it ‘replete’ is neither here nor there. The RCMA, because of some obvious defects, has from the onset become the target of comments and opinions. A judge cannot count on the spate of opinions to interpret the Act.

### 3.2 *No written contract*

Secondly, the judge puts a huge premium on the applicant’s insistence that she and the deceased instructed an attorney to prepare a written contract as envisaged in section 7(6) of the RCMA but could not proceed because they did not have money. It is obviously immaterial. Preliminary arrangements cannot be used to bind the parties – even less third parties such as the children and creditors.

### 3.3 *Adverse affect on other wives*

Also, Moshidi J seems to be overly concerned about the possibility that non-recognition could affect first and other former wives adversely. The reality is rather that it would affect the existing wife and children more adversely. Polygyny, initiated by men, is still practised on a large scale. Women are not part of the decision-making process. For instance, in the women’s rights *Resource book* issued by the Department of Justice and Constitutional Development (2006) 28 it is stated:

“Sometimes women are specifically excluded by custom, tradition or religion from positions in which they could be makers and/or interpreters of the law and in some instances women are excluded from such positions as chiefs and Islamic leadership, particularly important decision making structures in the society. Sometime though, the exclusion is not by operation of any law, but rather by practices which shape the interpretation and impact of the law. Continued protection of those practices, customs and religions exacerbates the existence of discrimination against women and children.”

Although the court has recently (we hope finally) decided that a civil marriage during the subsistence of a customary marriage is null and void (*Netshituka v Netshituka* (426/10) [2011] ZASCA 120), many men still have an urban (common law) wife and a rural wife. More urbanised women would try to pre-empt a valid customary marriage by entering into a civil marriage. On the

other hand men enter into further customary marriages without the consent of first or former wives. It is hard to believe, but

“Edward Ximba, leader of the Shembe church in Kwazulu-Natal, informed the researchers that the practice of polygamy is prevalent and encouraged, with the husband being advised to marry up to four wives if he can afford it. According to Ximba, polygamy is of practical import in the Church, since when a first wife is menstruating, she is not allowed to cook for her husband and so he must turn to his other wife. Ximba added that bigamy is very common since there are fewer males than females; however, for a man to have more than two wives is unusual” (Higgins *et al* “Gender and equality and customary marriage: Bargaining in the shadow of post-apartheid legal pluralism” 2007 *Fordham Int LJ* 13).

While the husband is alive the woman may grin and bear it, but when he dies the “further” wives will turn up and claim to share in the estate. In our official and private practices we find that this occurs far more frequently than other disputes and causes of action.

#### 4 Patrimonial consequences of the “new” marriage

We thought that the consequences were common sense because in the absence of an antenuptial contract all monogamous customary marriages are automatically in community of property. Another marriage would obviously be incompatible.

The consequences of a marriage in community of property are so well known that they do not really need mentioning (see eg Skelton *et al Family law in South Africa* (2010) 81–82), but for the sake of completeness we repeat the following:

- (a) All the assets belonging to the spouses prior to the conclusion of the marriage as well as all the assets that they accumulate after concluding the marriage fall into the joint estate, subject to a few exceptions. At the moment of the conclusion of the marriage, the ownership of the assets passes automatically to the joint estate and the normal rules with regard to the passing of rights do not apply.
- (b) Section 17(4) of the Deeds Registries Act 47 of 1937 requires only that when spouses bring immovable property into the marriage, they may make an endorsement on the title deed reflecting that the property forms part of the joint estate. If the spouses subsequently acquire immovable property, they must register it in both their names.

How on earth would one pool the assets of a third spouse if the prior marriage was concluded on the basis of an antenuptial contract: Surely it cannot be undone by operation of law, nor with the agreement of a third person (the further spouse).

If any one of the three should dissolve their marriage, what patrimonial consequences would ensue? Would the communal estate have to be split in three and thirds reconstituted to form the basis of a new community of property? May the husband use this reconstituted estate’s assets to maintain children of the divorcee and maybe their mother who may, under certain circumstances, be entitled to maintenance? Other laws may also come into play, such as the Pension Fund Act 24 of 1956. Section 7(7) of the Divorce Act 70 of 1979 now provides that the pension benefits payable to a former spouse are payable soon after the date of divorce, as opposed to when the member retires.

We cannot envisage how any benefits can accrue in the absence of a prior agreement. Intestate succession is also relevant and needs to be considered in

that only the deceased's part of the joint estate may devolve on the heirs and if any number of "further" marriages are voidable it may be necessary to go to court in each case for confirmation that such wives are spouses of the deceased.

## **5 Conclusion**

We are, from a legal administrative point of view, gravely concerned about the Moshidi judgment. It will encourage women who are not married to claim being married to merely reap the benefits. We think it cannot be left to the registering officer in the Department of Home Affairs to decide whether these "further" marriages are valid.

Must each and every "further" marriage in the absence of a prior contract henceforth be declared valid by a competent court? Or may the registering officer just go ahead and register it?

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